United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21990

TOTAL TELECABLE, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

KVOS TELEVISION CORPORATION,

Intervenor.

On Petition for Review of Orders of the Federal Communications Commission

BRIEF FOR INTERVENOR

PAUL DOBIN
ROY R. RUSSO
Cafritz Building
Washington, D. C. 20006
Attorneys for Intervenor

October 19, 1967

INDEX

	Page
TABLE OF AUTHORITIES	(i)
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT	
Station KVOS-TV Is Fully Entitled To All Of The Protection Provided By The Commission's CATV Rules And Regulations	2
CERTIFICATE	6

TABLE OF AUTHORITIES

First Report And Order (CATV) 38 F. C. C. 683 (1956)	2

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21990

TOTAL TELECABLE, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

KVOS TELEVISION CORPORATION,

Intervenor.

On Petition for Review of Orders of the Federal Communications Commission

---

BRIEF FOR INTERVENOR

COUNTERSTATEMENT OF THE CASE

KVOS Television Corporation (hereinafter "KVOS-TV") relies upon the statement contained in the Brief for the Respondent, Federal Communications Commission (hereinafter "the Commission") for a summary of the proceedings below.

ARGUMENT

Intervenor adopts the Brief of the Commission. It addresses itself herein to the contention made here by Petitioner that KVOS-TV is not entitled to the regular protection afforded by the Commission's Rules.

Station KVOS-TV Is Fully Entitled To All Of The Protection Provided By The Commission's CATV Rules And Regulations

In its decision here under review, the Commission reaffirmed the basis for its policy granting television stations protection against duplication of their programs by CATV systems importing signals into the service area of a local station (R. 111-112, para. 4). The Commission, in its decision establishing the non-duplication rules, determined that these rules provided necessary protection for local stations against the unfair competition which would result from such duplication of their programs. The Commission stated that these rules preserve "to local stations the credit to which they are entitled – in the eyes of advertisers and the public – for presenting programs for which they had bargained and paid in the competitive program market" (Para. 80, *First Report and Order*).

Petitioner's position is that because of what it considers special circumstances, Station KVOS-TV is not entitled to the same protection against unfair competition. It alleges (Brief, p. 46) that the normal protection against unfair competition afforded to all other television stations should not

be granted to KVOS-TV because of Petitioner's allegation that KVOS-TV receives the largest portion of its revenue as a result of the fact that it has viewers in Canada. The Commission in its decision held that this was an irrelevant consideration in applying the non-duplication policies and rules. In deciding whether the Commission's judgment was correct, it is appropriate to note the undisputed evidence before it which demonstrated that Station KVOS-TV is a fully American station required by the Communications Act to serve the needs and interests of the United States viewing public which is within its viewing area. The evidence further established beyond dispute that Station KVOS-TV fully meets its responsibilities as a licensee of the Federal Communications Commission.

In opposition to the Petition for Waiver, Intervenor made reference to its November 10, 1965 application for renewal of license which set forth in great detail the manner in which Station KVOS-TV fulfills its obligations as a licensee under the Communications Act (R. 40). In addition, in opposition to a Petition in Support of Request for Waiver, filed by KIRO, Inc., licensee of Station KIRO-TV, Seattle Washington (R. 68 through 104), KVOS submitted voluminous information demonstrating the nature of its local programming, with particular emphasis on educational and children's programming. The Petitioner at no time has controverted these facts. [1]

---

[1] The licensee of KIRO-TV, in its Petition in Support of Request for Waiver (R. 55), alleged that it supplies significant public service programming to communities served by Petitioner's CATV systems. However, Intervenor effectively refuted KIRO-TV's suggestion that this demonstrated that there is no need for KVOS-TV's local service (R. 73 and 82).

Petitioner disregards the fact the Intervenor has a large viewing audience in the United States and that the size of the audience is very important economically to KVOS-TV. In its Petition for Waiver (R. 4), Petitioner made the bare allegation that Station KVOS-TV does not rely on the communities served by Petitioner's CATV systems for its advertising revenues. However, at Paragraph 10 of the same Petition for Waiver (R. 5), Petitioner recognized that KVOS-TV is credited by the American Research Bureau with substantial net weekly circulation and average daily circulation within its large coverage area in the State of Washington. KVOS-TV made clear in its own pleadings, and it has not been disputed that its own network hourly rate is determined solely by the extent of its *domestic* audience (R. 6, 41, 49). Contrary to Petitioner's claim, the undisputed facts before the Commission demonstrated that loss of audience to KVOS-TV as a result of the failure of Petitioner's CATV system to provide non-duplication protection to KVOS-TV would be of extreme significance.

Under these circumstances, the Commission properly concluded (R. 112) that nothing alleged by the Petitioner had a material bearing on the basis for the Commission's non-duplication rules to protect local stations against unfair competition or provided a proper basis for waiver of the rules. Given the fact that KVOS-TV has a substantial domestic audience in the Northwest Washington area, and that *this audience* forms the basis for its network base hourly rate, the Commission correctly concluded that KVOS-TV's service to and revenues from its Canadian audience are irrelevant and immaterial to the disposition of Petitioner's waiver request since they do not affect the existence of the unfair competition which would result from duplication of Intervenor's programs. Indeed, nowhere in its Brief or in its Petition for Waiver before the Commission does Petitioner deny that

importation of distant signals which duplicate the same day programming of KVOS-TV would constitute unfair competition. Petitioner merely suggests that "unfair competition" is none of the Commission's business (Brief, p. 52, and Petition for Waiver, Para. 26 (R. 16)). We do not repeat here the answer to this argument set out at length in the Commission's Brief.

Petitioner also claims that affording Intervenor non-duplication protection would virtually eliminate two Seattle stations from its systems (Brief, p. 46). This claim, however, is totally without merit. In support of its request for waiver of the non-duplication rules, Petitioner had stated that it would be required to delete the two Seattle stations from its systems *or install switching equipment which would be required for this purpose* (R. 7). It has not alleged that it will suffer greater hardship or difficulty than all of the other CATV systems which have complied with the Commission's non-duplication rules by the installation of such switching equipment. No allegation was made that Petitioner could not afford such equipment. On the contrary, its own Petition showed that it has a total of 8,600 subscribers (R. 1-2) and there was no basis for the claim that the installation of this equipment would place an unjustifiable hardship upon it.

In this connection, it is important to point out that the Commission's non-duplication rules do not deprive the public of any programs which the Seattle stations might present. The non-duplication provisions only require deletion of the Seattle broadcasts when they are identical with programs which can be viewed over Intervenor's station. Nothing in the Commission's rules requires that programs provided by sources other than Intervenor must be deleted from CATV systems, whether such programs are presented by the Seattle stations or by the CATV system itself. There can therefore be no

loss of programs to the public. All the Commission requires is that the programs presented at great expense by local stations be free of duplication in a manner consistent with the Commission's basic television allocation plan.

Respectfully submitted,

/s/ PAUL DOBIN
ROY R. RUSSO
Cafritz Building
Washington, D. C. 20006

Attorneys for Intervenor
KVOS Television
Corporation

October 19, 1967

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ PAUL DOBIN